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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-881, 79-883

JOHN N. MITCHELL,
Petitioner and Cross-Respondent,

v.

BERTRAM ZWEIBON, *et al.*,
Respondents and Cross-Petitioners.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS AND CROSS-PETITIONERS

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In its Supplemental Memorandum for Petitioner and Cross-Respondents, the government asks that this Court not consider the question whether the defendant's alleged good faith belief that his conduct was constitutional is a valid defense notwithstanding the specific language of 18 U.S.C. § 2520 which recognizes a good faith defense only if there has been reliance upon "a court order or legislative authorization." The government's reason is

that this issue was not specified in our cross-petition as a question presented. The government's argument is unsound for at least three reasons:

First, the scope of the good faith defense was not, in fact, decided by the court of appeals in its most recent decision, and that question could not, therefore, technically have been enumerated in our cross-petition as a question presented by the decision below. The issue was decided by the court of appeals on the first appearance of the case before that court in 1975 (at which time we sought review of the issue in this Court by a petition for a writ of certiorari, which Mr. Mitchell opposed). We have requested that the issue be considered at this juncture—which would save judicial resources and might make it unnecessary for the parties to have recourse to this Court again—only because such a procedure seems logical and efficient. Moreover, the government's Response to our Cross-Petition in substance asks this Court to review and reverse those aspects of the court of appeals' 1975 ruling which were decided in our favor. Review of all issues determined by the court of appeals in 1975—including the scope of the good faith defense—would be even-handed and appropriate.

Second, our specific enumeration of this question when this Court is considering whether or not to grant a petition for a writ of certiorari surely obviates any prejudice which could arise from its omission as a question presented in the cross-petition. Unlike *Whirlpool Corp. v. Marshall*, 48 U.S.L.W. 4189, 4191 n.10 (U.S. Feb. 26, 1980), this is not a situation in which an issue omitted at the petition for writ of certiorari stage is sought to be raised belatedly during the briefing of the case on the merits. It would be exalting form over substance to preclude review of an issue that has been specifically

described and brought to the Court's attention before the decision on certiorari, merely because it was not separately itemized in the initial document filed with the Court.[1]

Third, the issue that the government is trying to foreclose with its Supplemental Memorandum is one which could be raised in this Court in the future if it is not considered now. If, after consideration of the issues in the Petition and Cross-Petition, there were a trial in the district court under the court of appeals' standard of good faith and if plaintiffs then found it necessary to seek review from a final judgment, that issue would still be open in this Court. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

We have suggested that this Court review the good faith question if the petitions for writs of certiorari are granted because it would be reasonable and efficient to consider the principal legal issues heretofore decided in this case at one time rather than to fragment the questions in separate proceedings.[2]

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[1]The government does not suggest that the Court is without power to consider this issue. Such an argument would be frivolous. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). *See* R. Stern and E. Gressman, SUPREME COURT PRACTICE § 6.27 (5th ed. 1978).

[2]In this regard, it is also relevant that the complaint in this case was filed in 1971 and that the district court has twice erroneously (in the view of the court of appeals) granted summary judgment for the defendant, and once erroneously (in view of the court of appeals) denied plaintiffs a jury trial. *See* Cross-Petition for a Writ of Certiorari, No. 79-883, pp. 3-4. In view of this record, it is not in the interest of justice to subject the parties to further piecemeal litigation on an appellate level, particularly on the critical issue of the availability of the good faith defense.

For the foregoing reasons, we request that the parties be instructed to brief the question of the scope of the good faith defense in 18 U.S.C. § 2520 which was decided by the court of appeals in 1975.

Respectfully submitted,

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